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No. 03-935

In the Supreme Court of the United States

NORTH DAKOTA, ET AL., PETITIONERS

v.

KURT F. UBBELOHDE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in reversing two preliminary injunctions that required the United States Army Corps of Engineers to maintain water levels in certain reservoirs in the Missouri River Main Stem Reservoir System during the smelt-spawning season of Spring 2002.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 330 F.3d 1014. The order of the district court for the District of South Dakota granting the State of South Dakota a temporary restraining order prohibiting the lowering of water levels in Lake Oahe (Pet. App. 35-48) is unreported. The order of the district court for the District of South Dakota granting South Dakota a preliminary injunction prohibiting the lowering of water levels in Lake Oahe and Lake Francis Case (*id.* at 49-63) is unreported. The order of the district court for the District of North Dakota granting the State of North Dakota a temporary restraining order prohibiting the lowering of water levels in Lake Sakakawea (*id.* at 64-65) is unreported.

The order of the district court for the District of North Dakota entering a preliminary injunction prohibiting the lowering of water levels in Lake Sakakawea (*id.* at 69-71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2003. Petitions for rehearing en banc were denied on September 30, 2003 (Pet. App. 82). The petition for a writ of certiorari was filed on December 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of temporary restraining orders (TROs) and preliminary injunctions issued by the federal district courts of North Dakota, South Dakota, and Nebraska involving the operation of dams and reservoirs along the Missouri River controlled by the United States Army Corps of Engineers (the Corps). The TROs and preliminary injunctions issued by the North Dakota and South Dakota district courts prohibited the Corps from lowering water levels in certain Missouri River reservoirs within those States. The preliminary injunction issued by the Nebraska district court required the Corps to maintain certain minimum water flows in the Missouri River. The court of appeals reversed the preliminary injunctions entered by the North Dakota and South Dakota district courts and remanded for further proceedings, but affirmed the preliminary injunction issued by the Nebraska district court. Pet. App. 1-34.

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or Act), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. The Act and other

legislation authorized the Corps to build and operate a series of six dams and associated reservoirs comprising the Missouri River Main Stem System of Reservoirs (Main Stem System), which are situated in North Dakota, South Dakota, Nebraska, and Montana.[1] The Act authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," providing that "the operation of any such project shall be in accordance with such regulations." 33 U.S.C. 709. The Act and its legislative history identify purposes that the Corps is to serve in operating the Main Stem System, including flood control, the provision of hydropower, irrigation, recreation, navigation, water supply and water quality, recreation, and the preservation of fish and wildlife. Pet. App. 4-5, 102.

The Corps has developed a water control plan for operation of the Main Stem System that is designed to serve the congressionally identified purposes of the Act. The guidelines used in the execution of that water control plan are embodied in the Missouri River Main Stem Reservoir System Master Reservoir Regulation Manual, commonly known as the "Master Manual." Pet.

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[1] The six Main Stem System dams are as follows, with the associated reservoirs identified in parentheses: Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction and operation of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation. Its authorization was amended in 1938 to add the purpose of providing hydroelectric power. See Act of May 18, 1938, ch. 250, 52 Stat. 403.

App. 6. The Master Manual was first published in 1960, and the current version was issued in 1979. *Id.* at 37. The 1979 Master Manual sets forth the Corps' general approach for operating the reservoirs, which calls for it to consider the congressionally identified interests in making operational decisions. *Id.* at 6. The 1979 Master Manual sets forth a "general approach" of priorities for the interests served by the Main Stem System. Master Manual § 9-3, pp. IX-1. It gives flood control the highest priority, followed in order by irrigation (and "other upstream water uses for beneficial consumptive purposes"), downstream water supply and water quality requirements, navigation and power, recreation, and fish and wildlife. *Id.* at IX-1 to IX-2; see Pet. App. 32. The Corps has for several years been preparing an updated version of the Master Manual. In addition, each year, the Corps promulgates an Annual Operating Plan (AOP), which sets forth its plans on how it will operate the Main Stem System for that coming year. The Corps develops each year's AOP in cooperation with federal and state agencies, local governments, and citizens in an effort to address the multiple purposes for which it operates the Main Stem System. Pet. App. 7. Because of limitations on long-term weather forecasting, each year's AOP lays out alternative plans for operation of the System depending on the amount of carry-over storage in the reservoirs and the precipitation the Missouri River Basin receives.

2. The dispute in this case arose out of the prolonged drought conditions that the Missouri River Basin has experienced over the last several years. The shortage of water has required the Corps to make decisions about the allocation of water among competing interests (Pet. App. 3, 7), and to design a plan of operations that satisfied to the greatest extent the competing

purposes of the Flood Control Act. In drought years, the Corps generally tries to maintain steady or rising water levels in five of the six Main Stem System reservoirs while drawing down water in one of the three largest reservoirs (Lake Sakakawea, Lake Oahe, and Fort Peck Lake) to ensure that enough water is in the Missouri River to support downstream uses, including navigation, water supply, and water quality (*i.e.* sanitation) requirements. *Id.* at 7, 29, 31. The Corps generally attempts to shift the burden of supplying downstream needs between reservoirs from year to year during drought periods. *Id.* at 7. In the 2002 AOP, the Corps decided to provide for downstream uses by releasing water from Lake Oahe in South Dakota, the second-largest reservoir in the System, see *id.* at 5, because that reservoir's water level had not been reduced the previous year (indeed, it had increased). *Id.* at 7.

a. South Dakota informed the Corps that it believed that declining water levels at Lake Oahe would harm the spawn of the rainbow smelt, a prey species that provides an important source of food for walleye, a popular trophy fish in the lake. Pet. App. 7-8. South Dakota claimed that losses to smelt would in turn inhibit the growth of walleye stocks, and would harm economic interests by reducing recreational fishing on the lake. *Ibid.* The Corps declined to alter its AOP either by drawing down another reservoir or by curtailing the navigation season on the Missouri River. On May 2, 2002, South Dakota obtained a temporary restraining order from the district court for the District of South Dakota, which prohibited the Corps from lowering water levels at Lake Oahe until May 11, 2002. *Id.* at 35-48. The order emphasized that the TRO affected only Lake Oahe and that "[i]f the Corps desires

to draw down other reservoirs, it is free to do so." *Id.* at 47. The Corps then began drawing down Lake Francis Case, also in South Dakota, to provide for downstream uses. *Id.* at 50.

On May 13, 2002, after a hearing, the court issued a preliminary injunction prohibiting the Corps from lowering the water levels of both Lake Oahe and Lake Francis Case until May 25, 2002. Pet. App. 49-63. The court concluded that South Dakota had shown a likelihood of success on the merits on two arguments: first, that judicial estoppel supported issuance of an injunction, based on the argument that the Corps had represented to the district court for the District of Montana during litigation in the early 1990s that the Corps would give equal weight to all water uses and not favor navigation, and that in choosing to draw down Lake Oahe and Lake Francis Case the Corps allegedly had failed to abide by that representation (Pet. App. 56-57); and second, that the Corps' decision to provide for "a full eight month [navigation] season" at the expense of upstream fisheries of arguably greater economic value "may well be arbitrary and capricious" (*id.* at 59) and thus violative of the Administrative Procedure Act, 5 U.S.C. 706. The court stated that it believed the Corps' decision was "largely due to the Corps' reliance on out-dated and inaccurate information to guide its operations," specifically the 1979 Master Manual, which, it observed, "has been for years in need of substantial revision."[2] Pet. App. 57-58.

b. The South Dakota TRO had a "cascading effect." Pet. App. 9. To provide for downstream uses in light of

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[2] Before the hearing on the preliminary injunction, the State of Nebraska and several private entities had moved to intervene in the case, but the district court denied intervention. Pet. App. 9.

restrictions on Lake Oahe, the Corps planned to draw down Lake Sakakawea in North Dakota, the largest reservoir in the Main Stem System. Pet. App. 5. The State of North Dakota then brought suit in the district court for the District of North Dakota seeking to enjoin the Corps from lowering that reservoir. The district court entered a TRO on May 12, 2002, requiring the Corps to maintain that lake's water level for a period of ten days. *Id.* at 64-65. When the TRO expired, the court converted it, with the agreement of the parties (who reserved the right to appeal), into a preliminary injunction that would expire on May 25, 2002. *Id.* at 66-71. The Corps then planned to accommodate downstream interests by lowering Fort Peck Lake in Montana, but the State of Montana, on May 13, 2002, obtained a TRO from the district court for the District of Montana prohibiting the Corps from increasing releases of water from that reservoir for a period of ten days.[3] See *id.* at 9 n.2; *id.* at 72-74.

c. After the South Dakota district court denied the State of Nebraska permission to intervene in the lawsuit involving Lake Oahe and Lake Francis Case, see note 2, *supra*, Nebraska sought injunctive relief from the district court for the District of Nebraska in an effort to ensure the maintenance of minimum water flow rates in the Missouri River necessary for navigation. On May 13, 2002, that court issued a preliminary injunction requiring the Corps to "maintain the

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[3] Because of the great distances involved, it was unclear whether water released from Fort Peck Lake could reach the navigable part of the Missouri River before the North Dakota and South Dakota injunctions expired. Accordingly, the Corps did not appeal the preliminary injunction entered in Montana, and Montana did not further pursue its case against the Corps. Pet. App. 9 n.2.

minimum navigation flows below Gavins Point Dam," the most downsteam dam in the Main Stem System, "as identified in the 1979 Master Manual and current [AOP]." Pet. App. 80-81. The district court stated that it was "reluctant to interfere with the discretion of the Corps, but must recognize that court orders in other jurisdictions designed to safeguard interests of upstream water users are quickly stripping the Corps of Engineers of its ability to function as an objective steward of the water flows in the Missouri River Basin." *Id.* at 80. This series of injunctions and TROs left the Corps able to use water from only the two smallest reservoirs in the Main Stem System to maintain water flows sufficient for navigation and other downstream uses. See *id.* at 10.

3. Faced with the need to comply with potentially conflicting injunctions, on May 17, 2002, the Corps filed a motion for a stay of the North Dakota, South Dakota, and Nebraska injunctions pending appeal. On May 22, 2002—three days before the South Dakota and North Dakota injunctions were to expire by their own terms—the court of appeals granted the Corps' motion. Pet. App. 10.

4. The court of appeals reversed the South Dakota and North Dakota injunctions and remanded those cases for further proceedings, but it affirmed the Nebraska injunction. Pet. App. 1-34. The court did not address at length the irreparable injury, balance of harms, or public interest considerations bearing on the propriety of the preliminary injunctions, concluding that "[t]he dispositive issue * * * is the likelihood that each plaintiff would succeed on the merits." *Id.* at 20.

a. The court first rejected the Corps' argument that determinations about the operation of the Main Stem System were committed to agency discretion by law

under 5 U.S.C. 701(a)(2) and therefore were not subject to judicial review. Pet. App. 20-26. While agreeing that the Flood Control Act "clearly gives a good deal of discretion to the Corps in the management of the River," *id.* at 21, the court held that such "discretion is not unconstrained" because the Act "lays out purposes that the Corps is to consider in managing the River," *ibid.* Because the Flood Control Act "calls upon the Corps to balance" the interests of "flood control, navigation, recreation, and other interests," the court of appeals concluded that courts "can review the Corps's decisions to ensure that it considered each of these interests before making a decision." *Ibid.* The court further concluded that the "minimal guidance provided by the Flood Control Act," *id.* at 22, does not provide "a method of deciding whether the balance actually struck by the Corps in a given case is correct or not," *id.* at 21. But the court noted that the 1979 Master Manual "sets out priorities and directs the Corps to take certain actions in given situations." *Id.* at 22. The court held that the 1979 "Master Manual is binding on the Corps because it sets out substantive requirements, and its language and context indicate that it was intended to bind the Corps's discretion." *Ibid.* Because courts could "review the Corps's actions to ensure conformity" with the 1979 Master Manual (*id.* at 26), the court of appeals held that "there is sufficient law to apply" that decisions about the operation of the Main Stem System are not committed to agency discretion by law. *Ibid.*

b. The court of appeals next held (Pet. App. 26-31) that the South Dakota district court erred in issuing the preliminary injunction restraining the Corps from lowering water levels in Lake Oahe and Lake Francis Case because the State of South Dakota was unlikely to succeed on the merits of its claims. The court rejected

South Dakota's claim that the relevant standard in reviewing the Corps' decisions was whether it had "maximize[d] the benefits to all interests" (*id.* at 27), concluding that such a standard is inconsistent with general administrative law principles because it would afford Corps decisions "no deference" and would require review of agency decisions "no matter how minute." *Id.* at 28. The court also rejected the State's reliance on the proposition that "judicial estoppel require[d] the Corps to give equal consideration to recreation and other interests including navigation" because of representations the Corps allegedly had made during previous litigation in the Montana district court. *Ibid.* The court observed that, even assuming that the elements of judicial estoppel were present in this case, "the Corps's decision to lower one reservoir per year during a drought simply does not provide any proof that the Corps was not giving recreation equal consideration" (*id.* at 29-30), because "[e]qual consideration does not mean" that interests in recreation would necessarily prevail. *Id.* at 29; see also *ibid.* (noting that "South Dakota has presented no evidence that the Corps did not give equal consideration to recreation" and that "the Corps maintains that it considered the interests of recreation equally"). Finally, the court explained that the Corps' decision was not arbitrary and capricious under the APA:

> The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. The Corps had evidence that every reservoir did not need to have a good spawn each year to maintain the fish stocks. * * * The Corps decided to alternate the harm among the reservoirs, maintaining the water level at all but one reservoir

> each year. This plan would presumably allow each reservoir to have a fruitful spawn five out of every six years even in the worst drought conditions.[4] This plan was eminently rational.

Id. at 30-31.

For similar reasons, the court concluded that "the North Dakota District Court erred in entering a preliminary injunction" in favor of North Dakota, Pet. App. 32, rejecting the "quite similar" (*id.* at 31) arguments North Dakota had proffered in defense of that injunction. The court remanded both the South Dakota and North Dakota cases to their respective district courts for further proceedings.[5] *Id.* at 31, 32.

c. Finally, the court of appeals held that the Nebraska district court had properly concluded that the 1979 "Master Manual * * * binds the Corps" and that Nebraska "was entitled to an order that the Corps

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[4] The court of appeals erroneously stated that the Corps rotated among all six reservoirs in the Main Stem System. As explained above, see p. 5, *supra*, the Corps generally alternates among only the three largest reservoirs in the system.

[5] The court concluded that the expiration of the South Dakota and North Dakota preliminary injunctions did not render moot the appeals of those injunctions, because the cases fell within the exception to the mootness doctrine for questions "capable of repetition, yet evading review," Pet. App. 11 (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). The court reasoned that injunctions barring water releases during spawning periods would "never last long enough to allow for full litigation because of the brevity of spawning season," *id.* at 12, and "the questions presented in this appeal are likely to recur" in light of continuing drought conditions along the Missouri River. *Ibid.* The court also concluded that the South Dakota district court had erred in denying the State of Nebraska and private entities intervention. *Id.* at 12-18. Those determinations are not at issue before this Court.

abide by its own formally adopted policies." Pet. App. 32-33. Although it observed that "[p]robably the Corps should be accorded some flexibility" to depart from the 1979 Master Manual "when unforeseen circumstances arise," *id.* at 33, the court "le[ft] such questions to the District Court to decide on remand if necessary." The court vacated its stay of the Nebraska injunction and remanded for further proceedings.

5. Shortly after the court of appeals issued its opinion, the district court for the District of Columbia issued an injunction limiting the Corps' discharge of water from the reservoirs into the lower Missouri River. *American Rivers* v. *U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230 (D.D.C. 2003). The court issued that injunction because it had concluded that lower discharges were needed to protect certain species of fish and birds listed as threatened and endangered under the Endangered Species Act. *Id.* at 262-263. That injunction appeared to conflict with the injunction issued by the Nebraska district court, which required higher water flows from the reservoirs to maintain navigation in accordance with the 1979 Master Manual. The Judicial Panel on Multidistrict Litigation subsequently consolidated all of the district court cases addressed by this petition and the *American Rivers* litigation before a single district court in the District of Minnesota for pretrial procedures. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003). As part of that ongoing litigation, and in order to ensure that any litigation over the Corps' 2004 AOP will be resolved in a timely manner, that district court has ordered the Corps to produce its revised Master Manual (and 2004 AOP) by March 19, 2004. See Memorandum and Order, *In re Operation of the Missouri River Sys. Litig.*, 03-MD-1555 (PAM), at 8

(D. Minn. Feb. 26, 2004). The Corps expects to meet that deadline.

ARGUMENT

Petitioners contend that the court of appeals misinterpreted the Flood Control Act by concluding that it "obligates the Corps to give priority to flood control and navigation" (Pet. 25) at the expense of recreation, and that the Corps has consistently and impermissibly favored navigation at the expense of recreational interests. *Ibid.* Petitioners also claim that "the 1979 *Master Manual* that the Corps uses to manage the river is outdated and requires revision." Pet. 20. Petitioners argue that this Court should grant review "to authoritatively define what priorities bind the Corps of Engineers and the degree of flexibility that it has in applying those priorities." Pet. 27. None of those contentions furnishes a basis for certiorari here. The court of appeals' decision reversing the North Dakota and South Dakota injunctions is correct and does not conflict with any decision of this Court or of any other court of appeals. Review therefore is unwarranted, particularly in view of the interlocutory posture of the case and the Corps' expected issuance of the revised Master Manual addressing the operation of the Main Stem System.

1. Petitioners err in contending that the court of appeals held that "the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation" (Pet. 25) and that "the Corps has a duty to generally prefer navigation over recreation" (Pet. 21); see also Pet. 19 (stating that the court of appeals' decision "gives a preference to * * * navigation"). The court of appeals' decision does not establish priorities among the interests recognized by the Act

that the Corps must follow in operating the Main Stem System. While the court stated that "[t]he Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system—flood control and navigation," Pet. App. 21 (citing *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 512 (1988)), see also *id.* at 5, 32, the court did not say that the Act requires that those two functions be given priority at the expense of other functions, including recreation.[6] The court of appeals stated in the very next sentence that "the Act also recognizes recreation and other interests * * * that should be provided for," *id.* at 21, and the court noted that the Corps must "consider[] each of these interests before making a decision." *Ibid.* The court further stated that "the Flood Control Act calls on the Corps to balance these various interests" (*ibid.*), and did not suggest that the Act requires that navigation be favored in that analysis. Indeed, the court pointed out that the Flood Control Act provides only "minimal guidance" (*id.* at 22) and "does not provide * * * a method of deciding whether the balance actually struck by the Corps in a given case is correct or not." *Id.* at 21.

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[6] As petitioners note (Pet. 26), in *ETSI Pipeline*, the Court stated that the Sloan Plan proposed by the Corps before passage of the Flood Control Act "recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation." 484 U.S. at 512. The Court's description of the "dominant function" of the reservoirs under the Sloan plan was relevant in determining whether operation of the Main Stem reservoirs would come within the jurisdiction of the Corps or the Department of the Interior. See *ibid.* The Court did not address the issues in this case concerning the Corps' own balancing of competing uses for water.

Although the court of appeals concluded that the Corps had not acted "impermissibl[y]" (Pet. App. 32) in the 1979 Master Manual by giving navigation priority over recreation, there is no indication the court believed that priority was *required* by the Flood Control Act. Rather, the court noted that "[t]he Flood Control Act provides little guidance about what priority the Corps can or must give to different interests." *Ibid.* While the court noted that "the sequential listing of interests" in the Act, which "uniformly lists navigation before recreation," suggests that "the Corps's primary concerns *should be* flood control and navigation," *ibid.* (emphasis added), the court did not say that the Act requires navigation to be given priority over recreation as a general matter or in all respects much less that the Act itself required the Corps to make the decision it did in 2002 to lower water levels in Lake Oahe. Moreover, the fact that the court noted that "South Dakota has presented no evidence that the Corps did not give equal consideration to recreation" (*id.* at 29; see also *id.* at 29-30 (noting absence of "proof that the Corps was not giving recreation equal consideration" with navigation, and that "the Corps maintains that it considered the interests of recreation equally")) belies petitioners' claim that the court considered the Corps bound under the Act to give priority to navigation over recreation.[7]

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[7] Petitioners err in contending (Pet. 25) that the Corps consistently favors navigation over upstream interests. Since the early 1990s, the Corps has given equal consideration to all the purposes outlined in the Flood Control Act and its legislative history. Petitioners' claim also overlooks the fact that the Corps has, in the past, shortened the navigation season to protect upstream reservoirs during drought years. See, *e.g.*, *Missouri* v. *Craig*, 978 F. Supp. 902, 905 (W.D. Mo. 1997) (suit brought by Missouri challenging Corps' shortening of navigation season),

2. In addition, this Court ordinarily does not review interlocutory decisions of the sort at issue here. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R. R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see generally Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Petitioners sought preliminary injunctions to prevent harm to smelt spawns during the pendency of their lawsuits challenging the Corps' plan to lower the water levels in certain reservoirs during the 2002 season. The court of appeals did not render a final judgment on the merits of their suits, which remain pending in district court, but simply determined the propriety of the granting of preliminary injunctions in light of its assessment of petitioners' likelihood of success, and remanded for further proceedings. See Pet. App. 31, 32. See generally *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981) (noting difference between standard for preliminary injunction and final judgment); *Brown* v. *Chote*, 411 U.S. 452, 456 (1973) (same). Petitioners will be able to seek review of any final judgment entered in those cases. Because the injunctions issued to petitioners have expired by their own terms (see Pet. 13-14), there is no pressing need for this Court to review the court of appeals' decision. The lack of finality of the judgment below is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

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vacated as moot, 163 F.3d 482 (8th Cir. 1998); *Missouri* v. *Bornhoft*, No. 92-4206-CV-C-9 (W.D. Mo. Aug. 28, 1992) (same; oral ruling denying preliminary injunction).

3. An additional reason why review is not now warranted is that events likely will substantially affect the future course of legal proceedings concerning the Corps' operation of the Main Stem System. One of petitioners' basic claims is that the 1979 Master Manual places too little emphasis on recreation and too much on navigation. See, *e.g.*, Pet. 20 ("the 1979 *Master Manual* that the Corps uses to manage the river is outdated and requires revision"). Indeed, the South Dakota district court stated, in granting its preliminary injunction, that "[i]t is that [1979] Master Manual which * * * fuel[s] the on-going controversy between the parties" by giving navigation a higher priority than recreation. Pet. App. 37. In accordance with a scheduling order in the consolidated Missouri River litigation of which this case is a part, the Corps expects that it soon will release a revised Master Manual that will supersede the 1979 version. See pp. 12-13, *supra*. The Corps anticipates that the new Master Manual will make important changes. For example, the Corps has proposed in a draft of the new manual that, unlike the 1979 Master Manual, the new manual will not list any specific priorities among the interests recognized by the Flood Control Act, but rather will embody the Corps' current policy of weighing all interests equally and maximizing to the extent possible all interests. That revision, if adopted, would effectively give petitioners the relief they have been seeking—an assurance that "the Corps should 'give all water uses equal consideration'" (*id.* at 15 (quoting First Amended Compl. para. 39, *South Dakota* v. *Ubbelohde*, Civ. 02-3011 (D.S.D. filed Apr. 30, 2002))) in making decisions about the operation of the Main Stem System reservoirs and dams.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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